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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-149

Dear Mr. Caton:

Enclosed for filing are an original and six copies of Comments of GST Telecom, Inc. Also enclosed is an extra copy to be stamped and returned.

Thank you for your attention to this matter.

Sincerely,

Eric J. Branfman

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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OCT 30 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of : Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149

COMMENTS OF GST TELECOM, INC.

GST Telecom, Inc. ("GST") by its undersigned counsel respectfully submits these comments in response to the Commission's NPRM issued in the above-captioned proceeding.

While the Comment and Reply period has passed, GST respectfully asks that the Commission consider these Comments. GST believes that these Comments are necessary to address more fully issues concerning the proposed reclassification of ILECs as "non-dominant."

As a relatively new entrant in certain telecommunications markets dominated by ILECs - notably Hawaii - the issues raised in this proceeding are of great importance to GST as it seeks to gain interexchange (and local) access, and compete in the provision of interexchange services. GST's efforts in Hawaii to compete with GTE -- which is the dominant ILEC -- starkly illustrates the hostile and anticompetitive environment faced by new entrants seeking to gain access and compete to provide interexchange (and local) services in markets dominated by monopolist ILECs.

The ability of monopolist ILECs, like GTE, with control over "bottleneck" facilities to suppress or simply exclude competition underscores the vital importance of regulatory safeguards imposed on ILECs for the successful implementation of competition in the interexchange markets.

I. INTRODUCTION AND SUMMARY

GST is a competitive provider of intrastate, interstate, and international telecommunications services. With its affiliates, GST provides service to customers located within at least 20 states, including Hawaii.[1] As a competitive telecommunications provider nationwide, GST is acutely aware of the ability of ILECs to abuse their monopoly position in the local exchange market to eliminate competition and prevent entry in the interexchange market. In Hawaii, for instance, GTE's anti-competitive practices and its repeated attempts to use its monopoly power in the local access market and control over essential bottleneck facilities to suppress competition and prevent new entry into the interexchange market in Hawaii.[2]

GTE has abused its monopoly power in Hawaii by (i) refusing to grant GST access on economically reasonable terms to the only wireline facility linking the Hawaiian islands with one another (the "Interisland Cable") and (ii) refusing to allow GST to string its fiber on GTE's

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[1] GST's Hawaiian operating authority includes both data and voice services.

[2] The impact this has had on competition is instructive. As the federal district Court for the District of Hawaii has recognized when it approved the decree against GTE, that the Hawaiian market has historically had "higher rates, fewer services, and less competition in telecommunications than the mainland states." United States v. GTE Corp., 603 F. Supp. 730, 750 (D.D.C. 1984). More recently, the Hawaiian Public Utilities Commission denied in its entirety GTE's request for a rate increase and found that GTE's service quality "is below acceptable standards." Decision and Order No. 13950 at 53-54 (HPUC June 9, 1995).

telephone poles. Each of these refusals were specifically aimed at unlawfully preserving GTE's monopoly over local and interstate access by vastly increasing its rival's costs of providing telecommunications services. These refusals have also impeded competition in the interexchange market involving calls originating and terminating in Hawaii. It was only after the passage of the Telecommunications Act of 1996 that GTE, faced with a strict and unequivocal federal mandate requiring unbundling of network elements, began negotiating with GST to provide access to the GTE Interisland Cable and pole attachments. This illustrates that ILECs with monopoly control over bottleneck resources will abuse their position unless their conduct is tightly circumscribed by strong legislation. The implementation of local competition is just beginning and the limits of the new legislation are being tested by incumbents nationwide seeking to conserve their dominant market positions. The Telecommunications Act will certainly foster the growth of local competition in the long run. In the short run, however, it cannot be said that other law and regulations defining the appropriate competitive conduct of incumbents are no longer needed. In addition, while the Act address local competitive issue it does not adequately safeguard the ability of new entrants to compete in the interexchange markets.

The ability of dominant independent LECs to exercise their monopoly power in local market to control the interexchange markets still requires the maintenance, for the time being, of the FCC's dominant carrier classification for independent incumbent LECs. GST also believes that the market power analysis proposed by the Commission is appropriate where monopolist ILECs control essential facilities. In certain markets ILECs have such dominant positions and exercise that power and their control over essential facilities to exclude competition. This is precisely the danger that the "dominant" carrier treatment of ILECs seeks to prevent. In Hawaii, for instance, GTE consistently has abused its monopoly position and control over access to interexchange facilities to prevent entry into the interexchange market by GST. Though monopolist ILECs, like GTE, may not be able to seriously threaten competition in a nationwide market, they can (and do) exercise their monopoly control over essential facilities to suppress or eliminate in-region competition in the interexchange market. Where monopolist ILECs control essential facilities, market power (and the ability to injure competition and consumers) cannot be properly evaluated solely by reference to a nationwide interexchange market. Unless the Commission retains the ability to consider the market power of ILECs in their local service areas, where circumstances warrant, ILECs will be able to exclude competition and thwart the intent of Congress and this Commission to promote competition in interexchange telecommunications markets.

The Telecommunications Act of 1996 is all about providing the benefits of competition to consumers of telecommunications services. The Act seeks to implement vigorous local competition in telecommunications markets so that consumers will reap the benefits of lower prices, increased choice as well as higher quality and output. The progress that has been made towards achieving the aims of Congress, however, has faced consistent resistance by established LECs seeking to maintain their dominant market positions by suppressing or even eliminating new competition. If competition is allowed to be thwarted in this way, consumers will be the ultimate losers.

II. DOMINANT CARRIER CLASSIFICATION OF ILECS IS APPROPRIATE

In regulating certain ILECs as "dominant" carriers the Congress and this Commission recognized the substantial anticompetitive potential of ILECs controlling essential facilities. ILECs must still be subject to the regulations or they will rapidly undo the achievements of

Congress and this Commission in promoting competition in the provision of interexchange services.

Specifically, the Commission's rules "define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (i.e., one that does not possess market power)." See 47 C.F.R. §§ 61.3(o), 61.3(t). Because ILECs are able to leverage their control over essential local facilities would enable them to raise their interexchange rivals' costs, they plainly possess market power and the Commission should apply dominant carrier regulation to any in-region, interstate, domestic interLATA services provided by ILECs or their affiliates. Moreover, the Commission should adopt a set of regulations properly addressed to the risks of monopoly leveraging by ILECs controlling essential facilities. In addition, regardless of classification, ILECs and their interexchange affiliates should be subject to advance tariff filing and cost support requirements, stringent separate affiliate and non-discrimination requirements, and periodic reporting requirements. Such regulations, while necessarily limited in their scope and effectiveness, can at lease check some of the more blatant forms of anticompetitive conduct, or make it at lease somewhat more feasible to enforce the rules against them.

III. WHERE ILECS ABUSE THEIR MONOPOLY CONTROL OVER ESSENTIAL FACILITIES THE RELEVANT GEOGRAPHIC MARKET MUST BE LOCAL

The interexchange market definition is irrelevant to the issue of whether ILECs can abuse their power in the local market to impede interexchange competition. Settled law establishes that market definitions and market share analyses are unnecessary when the presence of market power can be proven directly -- i.e., where ILECs control of local bottleneck facilities that are essential to the provision of long-distance services; or where undisputed power in one market (local services) can be leveraged to impede competition in a second market (interexchange). The proper markets to analyze here, therefore, are the markets for local and access services -- the markets where those bottlenecks exist -- rather than the interexchange market. In this regard, while interexchange services originating from a particular ILEC's service area generally cannot be a separate geographic market,[3/] a determination of the appropriate regulatory treatment of an ILEC's in-region interLATA services should focus on these areas.

As the Commission properly concludes, monopolist ILECs with control over essential facilities can abuse their market power in the interexchange market by restricting output and raising rivals' costs, or by leveraging their power into interexchange services by their raising of their rivals' costs through acts of discrimination, cost misallocation, the charging of excessive prices for access, and similar abuses which, as the Commission recognized, are very "difficult to police . . . ."

Such conduct not only threatens to eliminate rivals altogether, but in the interim causes substantial injury to consumers in the form of higher prices, or lower quality or output.[4/]

[3/] The Commission's existing market definition is correct in other contexts -- i.e., determining the appropriate regulatory treatment of interexchange carriers that possess no bottleneck power. Moreover, the Commission has properly defined the interexchange market as a single national market because even though there is not perfect demand substitution for interexchange services originating in different regions, there will be perfect supply substitution so long as each LEC will allow any carrier to offer interexchange services to the LEC's customers on nondiscriminatory terms. Under those circumstances, the Commission's existing "single national market" definition is the only approach that is consistent with settled legal and economic principles, including the Justice Department's Merger Guidelines.

[4/] See supra note 2.

Specifically, where ILECs' interLATA competitors are forced to pay excessive rates for access, they in turn must charge higher prices to consumers. Such pricing distortions will divert customers to the ILEC regardless of whether it provides better quality or is more efficient provider. In addition, unlike typical firms, monopolist ILECs engaging in predatory pricing are not forced to absorb substantial losses in the short run -- in fact, predatory pricing is cost-free to ILECs -- because any diminished revenue from the ILEC's competitive services is more than made up by increasing revenue from its monopoly services; through higher prices (or lower quality) to consumers.

IV. GTE HAS CONSISTENTLY ABUSED ITS MONOPOLY CONTROL OVER ESSENTIAL FACILITIES IN HAWAII

A. The Interisland Cable

GST and GTE are competitors offering telephone service in Hawaii. They are the only two carriers operating interisland transmission facilities providing point-to-point communications services within Statewide in Hawaii. Until GTE built facilities that would link the islands of Kauai, Oahu, Maui, and Hawaii by a high capacity fiber optic submarine cable ("Interisland Cable"), microwave transmission was the only method of providing a telecommunications link among the Hawaiian islands and thereby linking the islands other than Oahu with the Continental U.S. and the rest of the world. The Interisland Cable was required because of technical problems arising from the existing microwave technology, and because current and projected demand for high-bandwidth video and data telecommunications services could not be met by microwave.

Faced with the same constraints on its provision of competitive telephone services, GST also recognized the need for fiber optic capacity connecting the Hawaiian islands, and requested of GTE that it be permitted to participate in the Interisland Cable project. Without legitimate business justification, and contrary to its apparent economic interest, GTE refused to allow GST to participate in the project. Moreover, even though GST has authority to carry interexchange calls from the State of Hawaii to the mainland United States and internationally, GTE has denied GST access to the Interisland Cable. In order to offer service from the Hawaiian islands other than Oahu, GST must first be able to transport messages from the outer islands to Oahu via the Interisland Cable. GTE's refusal, up until the recent passage of the Telecommunications Act of 1996, to allow GST to use the only available facility to do so limited GST's participation in this market by forcing GST to use the vastly inferior method of microwave transmission.[5/] The Interisland Cable is an "essential facility," the denial of access to which constituted an act of monopolization by GTE.[6/]

[5/] As discussed below, GTE has further limited GST's participation in the interexchange market by refusing to allow GST to attach its fiber to GTE's poles.

[6/] MCI Comm. Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

1. GTE Has Abused its Monopoly Power and Control Over Essential Facilities to Exclude Competition

As reflected in its applications to the FCC and Hawaiian Public Utilities Commission, GTE has a 100% ownership interest in the Interisland Cable. GTE's market share in the markets for intrastate private line services, intrastate switched data service, interstate special access service, and interconnection for interstate switched access service range between 95% and 100%. Such market shares clearly establish GTE to be a monopolist.[7/]

GTE's refusal to allow GST to participate in constructing the Interisland Cable, and subsequent denial of access to the Cable were a blatantly anticompetitive act by a monopolist to unlawfully undermine the ability of GST -- as a new entrant -- to compete. By suppressing competition from GST and other potential entrants in the provision of local and interexchange services, GTE seeks to preserve its monopoly power in the Hawaiian telecommunications market. GTE's conduct deprives consumers of the benefits of competition not only for local service, but also for interexchange access and service. As a result, consumers had fewer choices and must suffer higher prices, and lower quality.[8/]

7/ See, e.g. Weiss v. York Hosp., 745 F.2d 786, 827 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985)(market share in excess of 80% confers monopoly power); Heatransfer Corp. v. Volkswagenwerk, AG, 553 F.2d 964, 981 (5th Cir. 1977), cert. denied, 434 U.S. 1087 (1978) (71% to 76% market share sufficient); see also United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (control of 75% of relevant market constitutes monopoly power)(dictum); Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co., 730 F. SUPP. 826, 902 (C.D. Ill. 1990), aff'd sub nom. Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991) (for market shares above 70%, "courts have simply inferred the existence of monopoly power without specifically examining. . .control over prices [or] competition")(dictum).

8/ See supra note 2.

2. The Interisland Cable Cannot Be Practically or Reasonably Duplicated

The Interisland Cable is "essential" notwithstanding the absence of technical obstacles to GST building its own submarine cable to link the Hawaiian islands. Competitors are not required to engage in impractical investments.[9] As the Seventh Circuit observed, "[A] monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization."[10]

While, as a result of GTE's consistent refusal to deal, GST announced a proposal for constructing its own cable linking the Hawaiian islands (at an estimated cost of $49.5 million), this proposal was contingent upon GST obtaining financing and signing long-term contracts with several large interexchange carriers. By comparison, sharing GTE's cable would cost $14.5 million for 50% of the Interisland Cable's capacity.

Nor is the existing microwave network a reasonable alternative to the Interisland Cable. As GTE itself has argued before this Commission, the existing microwave network was an inadequate substitute for the then-planned Interisland Cable because:

- Microwave facilities, unlike the planned fiber optic cable, are susceptible to natural and manmade atmospheric changes and thus are vulnerable to degraded signal liability or failure.[11]

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[9] See Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986). See Sunshine Cellular v. Vanguard Cellular Systems, Inc., 810 F. Supp. 486, 497-98 (S.D.N.Y. 1992) ("the plaintiffs must merely demonstrate that `duplication of the facility would be economically infeasible'"); see also Hecht v. Pro-Football, Inc., 570 F.2d 982, 993 (D.C. Cir. 1977) ("To be `essential' a facility need not be indispensable, it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe hardship on potential market entrants").

[10] Fishman, 807 F.2d at 540 (quoting Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484, 487 (1st Cir.), cert. denied, 344 U.S. 817 (1952)).

[11] GTE's Application for a Cable Landing license, (FCC SCL 93-0003), filed with the FCC, (continued...)

- Microwave capacity "is rapidly being reached."[12]
- The Interisland Cable is necessary to meet anticipated strong demand for high-bandwidth video and data services that cannot be met with the existing microwave spectrum.[13]

GTE was correct in advising the FCC that microwave is an inferior alternative to the Interisland Cable. Under Hawaiian conditions, the signal strength and fade margin of a microwave system are inferior to that provided by the fiber optics used in the Interisland Cable. This results from the distances between islands, the topography involved, and from interference from weather and electrical disturbances, phenomena to which the Interisland Cable is impervious. Additionally, in contrast to the Interisland Cable's nearly unlimited capacity, GST's microwave capacity is severely limited (4 to 8 DS1 lines available today and with limited growth options); these capacity limitations have been exacerbated by GTE's "warehousing" of residual microwave frequencies for "back-up," despite its ownership of the Interisland Cable.

3. GTE Denied GST Use of the Interisland Cable With No Legitimate Business Justification

GST and its predecessor attempted to participate in the operation and ownership of the Interisland Cable since learning in 1992 of GTE's plans to build the Interisland Cable. Until the passage of the Telecommunications Act of 1996, GTE refused these requests. GTE's refusal to

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(...continued)
November 16, 1992, at 6.

[12] Id. at 3.

[13] Id. at 5.

sell to GST either an ownership interest or an indefeasible right of use ("IRU") in the Interisland Cable, effectively denied, until recently, GST access to this essential facility and undermines GST's ability to compete in both the local and interexchange markets.

As the FCC has recognized, allowing carriers to purchase IRUs in common carrier submarine cable systems is significantly different than allowing them to acquire leased capacity. The ability to be a co-owner or IRU owner materially increases a carrier's flexibility to meet its communications needs.[14/] Carriers acquiring IRUs are able to assure themselves of the availability of capacity on a long-term basis, in return for a one-time capital outlay plus monthly maintenance and operational contributions. If GST were only able to obtain access to the Interisland Cable through GTE, it would be captive to GTE's rates, terms, and conditions for accessing the Interisland Cable, which would effectively foreclose any meaningful intramodal competition. Because GST would be forced to pay GTE a rate that covered GTE's overhead, and would at the same time incur its own overhead costs, GST would not be able to meet GTE's end user pricing for comparable facilities, even if GST were as efficient as GTE.

In addition, GTE's offer would require GST to purchase not only the right to use the fiber (which GST desires), but also the use of GTE transmission equipment at both ends of the cable (which GST does not desire, and would not need if GTE sold it an ownership or IRU interest, or even leased GST the fiber it needed.) "Agreeing to deal on unreasonable terms is merely a type of refusal to deal."[15/] Moreover, this "bundling" of wanted and unwanted facilities was in clear

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14/ See International Communications Policies, 104 F.C.C.2d 208, 257 (1986).

15/ Fishman, supra, 807 F.2d at 541; see Sunshine Cellular, supra, 810 F. SUPP. at 497 (continued...)

violation of the federal antitrust laws. GST had therefore requested that GTE sell it the right to use its fiber without having to pay GTE for the unwanted transmission equipment at both ends of the fiber, but GTE rejected this request.

GTE offered no legitimate business reason for its refusal to sell an ownership or IRU interest to GST.[16] While GTE claimed that all of the capacity of the Interisland Cable is or will be needed to meet its own needs by 1998, GTE told the FCC in its license application that the cable's capacity "can be increased by either adding fiber terminals to unused fibers or, depending on available technology, by upgrading existing terminals to a higher speed." In fact, when it denied GST's requests, GTE was using only four of the 12 strands in the Interisland Cable and was only using a fraction of the capacity of those four strands. Because the system is repeaterless, the true capacity of the system is limited only to the pace of advancements in laser technology.

GTE did not have any "valid business reasons" for its exclusionary acts. Specifically, there is ample capacity and space in the cable for GTE to sell GST an ownership or an IRU interest. The revenues paid by GST would clearly benefit GTE in the short run, without inhibiting GTE's ability to serve the public. Consumer welfare cannot possibly be enhanced by the exclusion of GST from the Interisland Cable. Particularly in light of GTE's warehousing of

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(...continued)
(plaintiff need not show "a complete refusal...; it is sufficient if the terms of [defendant's] offer to deal are `unreasonable'"); see also, Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), aff'd, 472 U.S. 585 (1985).

[16] See City of Vernon v. Southern California Edison Co., 1992-1 Trade Cas. ¶ 69,717 at 67,264 (9th Cir. 1992); Fishman, supra, 807 F.2d at 541; MCI Communications, supra, 708 F.2d at 1133. See also Eastman Kodak Co. v. Image Tech. Serv., Inc., 112 S. Ct. 2072, 2091 (1992) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985)) (exercise of monopoly power without valid business reason unlawful).

microwave capacity, the unavoidable inference is that GTE's refusal to deal was motivated by an anticompetitive desire to stifle competition from GST.

C. GTE HAS ABUSED ITS MONOPOLY POWER BY DENYING GST ACCESS TO ITS TELEPHONE POLES

GTE also prevented competition by denying GST access to its telephone poles in Hawaii. As with the Interisland Cable, this denial of an "essential facility" lacked a valid business purpose, and illustrates GTE's ability to abuse its monopoly control over bottleneck facilities to impede competition where such competition is technologically feasible.

It cannot be disputed that in order for a telephone company to obtain any substantial market share, it is necessary to establish a network by stringing fiber or cable from poles. It is common practice in the industry for two or more companies that need to string fiber or cable from poles along the same route to enter into pole attachment agreements, through which poles (and their costs) are shared, to the economic benefit of all sharing parties.

GTE controls the only poles on a large portion of the routes in Hawaii. (The other poles are controlled by the local electric utility.) Therefore, to establish a fiber or cable telephone network, it is necessary for GST to have the cooperation of <u>both</u> GTE and the local electric utility company. GST made appropriate request of both GTE and Hawaiian Electric Co., the dominant electric company in Hawaii, for attachment agreements. Hawaiian Electric expressed willingness to allow GST to attach to its poles at a reasonable fee. GTE, however, first flatly refused even to discuss pole attachments with GST. Were GST to attempt to string its fiber without the use of GTE's poles, its costs would be increased at least fivefold, while in some areas, because of permitting, environmental, and other considerations, there is literally no alternative right-of-way in which GST could string its fiber.

Because of GTE's refusal to allow GST to attach fiber to GTE's poles, at any price, GST was forced to resort to a much more costly alternative - obtaining "special access" lines from GTE - that could not be economically pursued on a large scale. "Special access" is simply a link between the customer's premises and GTE's serving wire center. It amounts to the same dial tone service that GTE sells to its own customers, without switching and cross-connection service. To illustrate how costly it is for GST to purchase special access from GTE (and how profitable it is for GTE to provide special access to GST), GTE sells dial tone service to its business customers for $39.10 per month plus a $76 installation charge, but sells GST the same service, without switching and cross-connection, for $127 per month, plus an installation charge of $400.

GTE provided no justification for its refusal to enter into a pole attachment agreement with GST other than to say that if pending state legislation, not then signed by the Governor, becomes law, it would in the future require GTE to offer GST a pole attachment agreement. GTE simply used the pendency of legislation as an excuse to delay and impede its competitor. Indeed, it was feasible for GTE to allow GST to share its telephone poles and their cost. In fact, GTE had for some time allowed another telephone carrier, Oceanic Communications, to string its fiber on GTE's poles on the island of Oahu. Thus, the only plausible explanation for GTE's conduct is GTE's desire to prevent competition from GST, and starkly illustrates the ability of monopolist independent LECs to suppress or eliminate competition at will and with ease.

GTE's anticompetitive conduct with respect to its poles shows GTE's ability and willingness to abuse its monopoly power to exclude competition.[17] What is more, by excluding GST from its poles and from the Interisland Cable, GTE seriously impeded GST's ability to compete in the market for providing interexchange service. This is the precise type of evil that the "dominant" carrier regulations seek to prevent. Because GTE and other ILECs with monopoly control over bottleneck facilities continue to engage in such anticompetitive conduct, the Commission should retain the "dominant" carrier classification for ILECs.

V. GTE Unlawfully Sought to Tie the Use of the Interisland Cable with the Use of GTE's Electronic Equipment at Each End of the Cable

Before recent negotiations, GTE's conditional offer to GST for access to the Interisland Cable, sought unlawfully to tied (or bundled) such use with the use of GTE's electronic transmission facilities at both ends of the cable.[18] GTE's bundling constituted an illegal tying arrangement because it forces buyers such as GST to purchase unwanted products (the use of GTE's electronic transmission facilities at both ends of the Interisland Cable) in order to obtain a wanted product (the use of the Interisland Cable).

17/ Recently, in an effort to inflict economic harm upon cable television operators in Hawaii, GTE raised its pole attachment rates for cable operators by 65% and its conduit rates by 650%. Significantly, these rate increases coincided with GTE's entry into the video marketplace as a video dial tone provider.

18/ See Kodak, 112 S. Ct. 2072.

Tying arrangements are especially pernicious and are among the handful of practices that are per se unlawful under the antitrust laws because they "pose an unacceptable risk of stifling competition."[19]

GTE's conduct clearly constituted illegal tying under the applicable antitrust standards.[20] The Interisland Cable is plainly a product distinct from the electronic transmission facilities at each end. There are no technical or economic impediments to unbundling the Interisland Cable from the electronic transmission facilities at both ends. Indeed, the use of fiber is often provided within the industry without electronic transmission facilities (this is called "dark fiber") or with merely a lesser optical interface.

Further, GTE attempts to "condition" the use of the Interisland Cable on the purchase of unwanted products. Despite repeated requests by GST to purchase an ownership or IRU interest in the Interisland Cable, GTE refused to discuss such an arrangement. The only offer GTE made pursuant to which GST could make use of the Interisland Cable was a proposal for GST to use the fiber in the cable provided that GST also uses (and pays for the use of) GTE's electronic transmission facilities at both ends of the Interisland Cable. GST has informed GTE that it does

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19/ Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).

20/ Tying arrangements qualify for "per se unlawful" treatment if they meet four criteria: (1) the existence of two separate products; (2) an agreement conditioning purchase of one of the products (the "tying" product) upon purchase of the other product (the "tied" product); (3) the seller's possession of sufficient economic power in the tying product market to restrain competition in the tied product market; and (4) a not insubstantial effect upon interstate commerce. See, e.g., Service and Training, Inc. v. Data General Corp., 963 F.2d 680, 683 (4th Cir. 1992); Tic-X-Press, Inc. v. Omni Promoters Co., 815 F.2d 1407, 1414 (11th Cir. 1987); see Kodak, supra, 112 S.Ct at 2079.

not desire to use its electronic transmission equipment, but GTE has been unwilling to provide GST with "dark fiber" -- the use of fiber without the use of transmission equipment.

Finally, the "market power" element also is present here. Not only does GTE have 100% of the market for interisland cable communications and nearly 100% of the market for interisland communications, but the estimated $49.5 million cost of construction of a new cable poses a tremendous barrier to entry.

CONCLUSION

GTE's anticompetitive conduct towards GST in Hawaii demonstrates ILECs' continued propensity to abuse their local monopolies to impede competition in local, interexchange access, and interexchange markets. The Commission should retain the "dominant" carrier classification for ILECs. Further, any analysis of the potential anticompetitive impact of ILECs on interexchange markets should consider an ILEC's market power and conduct in local exchange and access markets. Competition in telecommunications markets is now within reach as a result of sustained federal involvement and effort. However, the implementation of effective competition could be easily hampered by failing to apply all appropriate safeguards to prevent incumbent carriers, including ILECs, from abusing their monopoly power over bottleneck facilities essential to new entrants. Until competition has firmly established in both local and interexchange telecommunications markets, ILECs should continue to be classified as dominant. Therefore, GST urges this Commission to preserve dominant carrier classification to ILECs and supports the market power analysis the Commission proposes to apply for interexchange markets where incumbent LECs possess local monopoly control over bottleneck facilities essential for the ability of new entrants to compete to provide interexchange services.

Respectfully Submitted,

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Attorneys for GST Telecom, Inc.

Dated: October 30, 1996

172943.1

CERTIFICATE OF SERVICE

I, Eric J. Branfman, hereby certify that on this 30th day of October, 1995, copies of the foregoing "Comments of GST Telecom, Inc." were hand delivered to the following parties:

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